NO. 80-5275

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DEBRA JEANENE BRACEWELL,

PETITIONER

V.

STATE OF ALABAMA and
CHARLES GRADDICK, as Attorney General
of the State of Alabama,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

J. FLETCHER JONES
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P. O. DRAWER 1128
ANDALUSIA, ALABAMA 36420

COUNSEL FOR PETITIONER

August 22, 1980

QUESTIONS PRESENTED

1. Alabama's Death Penalty Statute allows a jury to choose only between a finding of guilt with an automatic death sentence and releasing the defendant entirely upon a finding of not guilty. §13-11-2, Code of Alabama, 1975, which is reproduced in Appendix G.

(A) Whether the case at bar in which petitioner has been sentenced to death under a Capital-Murder conviction in which the Trial Court did not permit the jury to consider a verdict of guilt of a lesser included offense is in conflict with the recent decision of the United States Supreme Court in Beck v. Alabama, No. 78-6621, decided June 20, 1980, and requires that this case be reversed.

(B) Where the evidence would have supported a verdict of guilt of a lesser included offense, may a sentence of death be constitutionally imposed?

2. Whether petitioner was denied due process of law by the failure of the Trial Court to afford petitioner the benefits due a juvenile as presecribed under the Juvenile Code of Alabama. §12-15-1 through §12-15-120, incl., Code of Alabama, 1975, which is reproduced in Appendix H.

3. Whether the Trial Court properly determined "voluntariness" of petitioner's statement in light of the "futuristic" aspects of the type of Miranda warnings given to petitioner by law enforcement officials.

4. Whether petitioner was deprived of her right to a speedy trial while incarcerated by the State of Alabama for a period of 107 days prior to her indictment for Capital-Murder on February 17, 1978.

5. Whether the Supreme Court of Alabama deprived petitioner of due process of law by its failure to grant petitioner the writ of certiorari as required under Rule 39(c) of the Alabama Rules of Appellate Procedure, which is reproduced in Appendix I.

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CONSTITUTIONAL PROVISIONS:

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Fifth Amendment

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Eighth Amendment

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Acts of Alabama, 1975, No. 1205

RULES OF COURT:

Alabama Rules of Appellate Procedure

Rule 39(b)

Rule 39(c)

Rule 39(j)

Alabama Rules of Juvenile Procedure

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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PETITIONER

V.

STATE OF ALABAMA and
CHARLES GRADDICK, as Attorney General
of the State of Alabama

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ALABAMA

The petitioner, Debra Jeanene Bracewell, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Alabama rendered in these proceedings on May 25, 1979, and July 6, 1979; the judgment of the Court of Criminal Appeals of the State of Alabama rendered January 22, 1980, and February 26, 1980; and the final judgment of the Supreme Court of the State of Alabama rendered April 11, 1980, denying petitioner's petition for writ of certiorari with no opinion.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama, as yet unreported, appears at Appendix A, infra, pp. 15-21. The opinion of the Supreme Court of Alabama, is unreported, and appears at Appendix B, infra, pp. 22-24. The Supreme Court of Alabama overruled petitioner's application for rehearing without opinion, and the decision is yet unreported, and appears at Appendix C,

infra, p. 25. The opinion of the Court of Criminal Appeals of Alabama is yet unreported, and appears at Appendix D, infra, pp. 26-36. The Court of Criminal Appeals of Alabama overruled petitioner's application for rehearing without opinion, and the decision is yet unreported, and appears at Appendix E, infra, p. 37. The Supreme Court of Alabama denied petitioner's petition for writ of certiorari, and the decision, as yet unreported, appears at Appendix F, infra, p. 38.

JURISDICTION

The order of judgment of the Supreme Court of Alabama denying petitioner's petition for writ of certiorari was entered on April 11, 1980. See Appendix F, p. 38, infra. There has been no order respecting a rehearing of the judgment of the Alabama Supreme Court's denying petitioner's petition for certiorari since Rule 39(j), Alabama Rules of Appellate Procedure, provides that "NO APPLICATION FOR REHEARING SHALL BE RECEIVED IN THE SUPREME COURT IF THE PETITION FOR CERTIORARI IS DENIED." The ninety day period for filing a petition for writ of certiorari in this Court will expire on July 10, 1980, unless extended. The time for filing a petition for certiorari in this Court was extended by order of Justice Lewis F. Powell, Jr., on July 8, 1980, which extended the time for filing a petition for writ of certiorari to and including September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Alabama's Death Penalty Statute allows a jury to choose only between a finding of guilt with an automatic death sentence and releasing the defendant entirely upon a finding of not guilty. §13-11-2, Code of Alabama, 1975, which is reproduced in Appendix G.

(A) Whether the case at bar in which petitioner has been sentenced to death under a Capital-Murder conviction in which the Trial Court did not permit the jury to consider a verdict of guilt of a lesser included offense is in conflict with the recent decision of the United States Supreme Court in Beck v. Alabama,

No. 78-6621, decided June 20, 1980, and requires that this case be reversed.

(B) Where the evidence would have supported a verdict of guilt of a lesser included offense, may a sentence of death be constitutionally imposed?

2. Whether petitioner was denied due process of law by the failure of the Trial Court to afford petitioner the benefits due a juvenile as prescribed under the Juvenile Code of Alabama. §12-15-1 through §12-15-120, incl., Code of Alabama, 1975, which is reproduced in Appendix H.

3. Whether the Trial Court properly determined "voluntariness" of petitioner's statement in light of the "futuristic" aspects of the type of Miranda warnings given to petitioner by law enforcement officials.

4. Whether petitioner was deprived of her right to a speedy trial while incarcerated by the State of Alabama for a period of 107 days prior to her indictment for Capital-Murder on February 17, 1978.

5. Whether the Supreme Court of Alabama deprived petitioner of due process of law by its failure to grant petitioner the writ of certiorari as required under Rule 39(c) of the Alabama Rules of Appellate Procedure, which is reproduced in Appendix I.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, which is reproduced in Appendix J.

2. This case also involves Article I, §6; Article I, §7; Article I, §8; Article I, §13; Article I, §15; Article I, §21; Article III, §42; Article III, §43; and amendment number 328 to Article VI, §6.05, of the Constitution of Alabama of 1901 as amended, which is reproduced in Appendix K.

3. This case also involves Act No. 1205, Acts of Alabama, 1975, approved October 10, 1975, effective January 16, 1977, which

is reproduced in Appendix L.

4. This case also involves Alabama Code §13-11-1 through §13-11-9, which is reproduced in Appendix G.

5. This case also involves Alabama Code §12-15-1 through §12-15-120, which is reproduced in Appendix H.

6. This case also involves Rule 39(c) of the Alabama Rules of Appellate Procedure adopted June 17, 1975, amended to January 16, 1977, which is reproduced in Appendix I.

7. This case also involves Alabama Rules of Juvenile Procedure, effective January 16, 1977, which is reproduced in Appendix M.

STATEMENT OF THE FACTS

The petitioner, Debra Jeanene Bracewell, a white indigent female, was born April 17, 1960, and was 17 when she was charged with the intentional killing of one Rex Carnley during a robbery occurring on the night of August 14-15, 1977. On November 2, 1977, petitioner was taken into custody in Elba, Coffee County, Alabama, and transported to the Covington County Jail in Andalusia, Alabama. She has remained continuously incarcerated since November 2, 1977. Petitioner was convicted on said Capital-Murder charge on April 21, 1978. The post-conviction hearing was held before Circuit Judge F. M. Smith on May 11, 1978, and on May 17, 1978, said Circuit Judge imposed the sentence of death by electrocution. Alabama's Death Penalty Act, §13-11-2 through §13-11-9, Code of Alabama, 1975. See Appendix G, pp. 39 -48, infra.

Petitioner was held as aforesaid in the Covington County Jail at Andalusia, Alabama, from November 2, 1977, without issuance of a warrant for her arrest on the charge of Capital-Murder until one was issued by the Circuit Court of Covington County, Alabama, on February 17, 1978. The Grand Jury of Covington County, Alabama, returned an indictment charging petitioner with the offense of Capital-Murder on February 17, 1978. Petitioner was first afforded counsel by appointment on February 17, 1978, and again by substitution on February 22, 1978. See Appendix N, pp. 186-187, infra.

UNDER ALABAMA LAW FELONY MURDER IS A LESSER INCLUDED OFFENSE OF THE CAPITAL CRIME OF ROBBERY-INTENTIONAL KILLING

This Court has judicially determined in Beck v. Alabama, 48 U.S.L.W. 4801 (No. 78-6621, June 20, 1980), that a death sentence may not be constitutionally imposed after a jury verdict of guilt of a capital offense where the jury was not permitted to consider a verdict of guilt of a lesser included offense. In Bracewell, petitioner requested lesser included offenses of the capital offense of robbery-intentional killing by written charges that were refused by the Trial Judge who would not permit the jury to consider the same. Therefore, it is mandatory on the outset that this case be reversed and remanded because of this constitutional error.

Further, there was absolutely no evidence connecting petitioner with the alleged crime except for an alleged "statement" made by petitioner on January 23, 1978, when she was 17 years of age and without benefit of counsel as required by the Juvenile Act of Alabama. The Trial Court overruled petitioner's objections and admitted the "statement" into evidence. See Appenidx H, pp. 49-94, infra. The Alabama Court of Criminal Appeals reversed petitioner's conviction in an opinion issued December 19, 1978, determining that under §12-15-1(3)b, Code of Alabama, 1975, the petitioner met the definition of a "CHILD," and that under §12-15-67, Code of Alabama, 1975, of the Juvenile Act, effective January 16, 1977, Parker v. Alabama, Ala. Cr. App., 351 So. 2d 927, cert. denied, Ala. 351 So. 2d 938 (1977), it was error for the Trial Court to admit petitioner's alleged "statement" into evidence because she was not advised by counsel at the time the statement was taken on January 23, 1978, when she was 17 years of age, as required by the Juvenile Act, and because of said error it was mandatory that the conviction be reversed and the cause remanded for a new trial. Watts v. State, 361 So. 2d 1200 (1978). See Appendix A, pp. 15 -21, infra.

The Supreme Court of Alabama reversed said decision of the Alabama Court of Criminal Appeals with a decision rendered May 25, 1979. See Appendix B, pp. 22-24, infra. Petitioner's application for

rehearing was denied without opinion by the Supreme Court of Alabama on July 16, 1979. See Appendix C, p. 25 , infra. After remandment, the Alabama Court of Criminal Appeals affirmed petitioner's conviction on January 22, 1980. See Appendix D, pp. 26 - 36, infra. Petitioner's application for rehearing before the Alabama Court of Criminal Appeals was denied without opinion on February 26, 1980. See Appendix E, p. 37 , infra. Petitioner's application for writ of certiorari to the Alabama Supreme Court from the decision of the Alabama Court of Criminal Appeals was denied without opinion on April 11, 1980. See Appendix F, p. 38 , infra. The Alabama Rules of Appellate Procedure in Rule 39(j) does not provide for application for rehearing on denial of application for writ of certiorari. See Appendix I, pp. 95-99, infra. Rule 39(c) ARAP provides that certiorari will be granted as a matter of right when the death penalty is imposed. See Appendix I, pp. 95-99, infra.

AN ABJECT FAILURE BY THE ALABAMA COURTS TO AFFORD PETITIONER DUE PROCESS OF LAW -- THE AFTERMATH BEING A TRIAL AND SENTENCE OF DEATH BY ELECTROCUTION

The Courts of Alabama committed an abject failure of due process by disregarding the established law governing a juvenile in the State of Alabama.

1. Under §12-15-1(3), Code of Alabama, 1975, petitioner met the definition of a "CHILD." At the time she was a "CHILD" in custody and without counsel, petitioner allegedly gave a "statement" dated January 23, 1978. She was a "CHILD" under this statute when the first arrest warrant was issued on February 17, 1978, charging her with the offense of Capital-Murder, and belatedly appointing her counsel. She was a "CHILD" at under this statute at the time she was put to trial and convicted on April 21, 1978. (Acts 1975, No. 1205, §5-101).

2. JURISDICTIONAL REQUIREMENT. §12-15-30(a)(1), Code of Alabama, 1975.

> (a) "The juvenile court shall exercise exclusive original jurisdiction of the follow-

ing proceedings, which are governed by this chapter:

(1) Proceedings in which a child is alleged to be delinquent, dependent, or in need of supervision. . ." (Acts 1975, No. 1205, §5-108.)

(b) DELINQUENT ACT. §12-15-1(8), Code of Alabama, 1975, provides "An act designated a crime under the law of this state. . ." (Acts 1975, No. 1205, §5-101.)

3. PROCEDURE. §12-15-50, Code of Alabama, 1975.

(a) "Cases before the court shall be initiated by the filing of a petition by the intake officer who shall receive verified complaints and proceed thereon pursuant to rules of procedure adopted by the supreme court. (Acts 1975, No. 1205, §5-114.)"

4. NOTIFICATION TO PARENTS AND THE CHILD OF RIGHT OF COUNSEL. §12-15-63, Code of Alabama, 1975

(a) "In delinquency and in need of supervision cases, a child and his parents, guardian or custodian shall be advised by the court or its representative at intake that the child has the right to be represented at all stages of the proceedings by counsel retained by them or, if they are unable to afford counsel, by counsel appointed by the court.

If counsel is not retained for the child in a proceeding in which there is a reasonable likelihood such may result in a commitment to an institution in which the freedom of the child is curtailed, counsel shall be appointed for the child."

5. NECESSITY FOR DETENTION. §12-15-60, Code of Alabama, 1975.

"(a) When a child is not released from detention or shelter care as provided in section 12-15-58, a petition shall be filed and a hearing held within 72 hours, Saturdays, Sundays and holidays included, to determine whether continued detention or shelter care is required.

(b) Notice of the detention or shelter care or other care hearing, either oral or written, stating the time, place and purpose of the hearing and the right to counsel shall be given to the parent, guardian or custodian if they can be found and to the child if such child is over 12 years of age or if delinquency is alleged. In every case of a dependent child, the department of pensions and security shall be notified.

(c) At the commencement of the detention or shelter or other care hearing, the court shall advise the parties of the right to counsel and shall appoint counsel as required. The parties shall be informed of the child's right to remain silent with respect to any allegation

of delinquency. They shall also be informed of the contents of the petition and shall be given an opportunity to admit or deny the allegations of the petition.

(e) If the child is not released and no parent, guardian or other custodian has been notified and none appeared or waived appearance at the hearing, upon the filing of an affidavit stating these facts, the court shall rehear the matter within 24 hours, Saturdays, Sundays and holidays included. (Acts 1975, No. 1205, §5-123.)"

6. TRANSFER OF CASES FROM JUVENILE COURT TO CRIMINAL COURT. §12-15-34, Code of Alabama, 1975.

"(a) The prosecutor may, before a hearing on the petition on its merits and following consultation with probation services, file a motion requesting the court to transfer the child for criminal prosecution, if:

(1) The child was 14 or more years of age at the time of the conduct charged and is alleged to have committed an act which would constitute a felony if committed by an adult; or

(b) The court shall conduct a hearing on all such motions for the purpose of determining whether it is in the best interest of the child or the public to grant the motion. If the court so finds and there are no reasonable grounds to believe he is committable to an institution or agency for the mentally retarded or mentally ill, it shall order the case transferred for criminal prosecution.

(c) When there are grounds to believe that the child is committable to an institution or agency for the mentally retarded or mentally ill, the court shall proceed as provided in section 12-15-70.

(d) Evidence of the following and other relevant factors shall be considered in determining whether the motion shall be granted:

(1) The nature of the present alleged offense;

(2) The extent and nature of the child's prior delinquency record;

(3) The nature of past treatment efforts and the nature of the child's response to such efforts;

(4) Demeanor;

(5) The extent and nature of the child's physical and mental maturity; and

(6) The interests of the community and of the child requiring that the child be

placed under legal restraint or discipline.

(e) Prior to a hearing on the motion by the prosecutor, a study and report to the court, in writing, relevant to the factors listed in subsection (d) of this section shall be made by probation services.

(f) When a person is transferred for criminal prosecution, the court shall set forth in writing its reasons for granting the motion, which shall include a finding of probable cause for believing that the allegations are true and correct. (Acts 1975, No. 1205, §5-129.)"

7. CHILDREN ACCORDED PRIVILEGE AGAINST SELF-INCRIMINATION; ADMISSIBILITY IN EVIDENCE, ETC., OF EXTRAJUDICIAL STATEMENTS OF CHILDREN AND EVIDENCE ILLEGALLY SEIZED OR OBTAINED; DOUBLE JEOPARDY. §12-15-66, Code of Alabama, 1975.

"(a) A child charged with a delinquent act or who is alleged to be in need of supervision shall be accorded the privilege against self-incrimination.

(b) An extrajudicial statement which would be constitutionally inadmissible in a criminal proceeding shall not be received in evidence over objection. Evidence illegally seized or obtained shall not be received in evidence over objection to establish the allegations against him. An extrajudicial admission or confession made by the child out of court is insufficient to support a finding that the child committed the acts alleged in the petition unless it is corroborated by other evidence."

(Acts 1975, No. 1205, §5-126.)

8. USE OF STATEMENTS OF CHILDREN, ETC., §12-15-67, Code of Alabama, 1975.

"Unless advised by counsel, the statements of a child or other information or evidence derived directly or indirectly from such statements made while in custody to police or law enforcement officers or made to the prosecutor or probation officer during the process of the case, including statements made during a preliminary inquiry, predisposition study, informal adjustment or consent decree, shall not be used prior to a determination of the petition's allegations in a delinquency or in need of supervision case or in a criminal proceeding prior to conviction. (Acts 1975, No. 1205, §5-125.)"

Petitioner was illegally incarcerated in the Covington County Jail from November 2, 1977, until she was formally charged by a warrant of arrest issued February 17, 1978, charging her with

Capital-Murder. Further, even after the transitional date of December 31, 1977, in the definition of a "CHILD" under §12-15-1, Code of Alabama, 1975, petitioner was not afforded the rights guaranteed to a child under the Judicial Act in that no proper petition was filed by law enforcement officials with the appropriate juvenile court intake officer; nor was petitioner afforded the right to counsel at the time she was placed into custody; nor was petitioner given a detention hearing before the juvenile court within the 72 hour period prescribed by the Juvenile Act; nor did the prosecution file with the juvenile court the appropriate motion to have petitioner's case transferred from the juvenile court to the appropriate higher court as prescribed by the Juvenile Act; nor at any time did law enforcement officials follow the correct prescribed procedure for obtaining statements from a juvenile as prescribed by the Juvenile Act.

Therefore, the alleged "statement" dated January 23, 1978, was illegally obtained from petitioner by law enforcement officials under the plain meaning of the Juvenile Act defining petitioner as a "CHILD" and absence of counsel which was required.

Moreover, it is inescapable from the record that petitioner was a frightened 17 year old girl, without family, friends, or an attorney to advise her, and that finally after repeated interrogations over a three months period, during which time she had not been formally charged, or a formal arrest warrant issued, gave a written statement. Because of her age and limited educational and mental background, this alleged "statement" admitted into evidence was not the product of a rational intellect, knowingly and intelligently made by voluntarily waiving her privilege against self-incrimination and her right to have appointed counsel. A mere reading from a card Miranda warnings does not legally comply with Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Glaringly adding to the "totality of circumstances" found in the record is the illegal restriction by the Trial Court precluding petitioner from offering evidence of the surrounding circumstances leading up to giving the "statement" on January 23,

1978. Petitioner was deprived of her right to due process of law under the Fourteenth Amendment to the United States Constitution by not being given a fair and speedy trial when she was confined in custody from November 2, 1977, until being formally arrested and charged with the alleged crime on February 17, 1978.

Finally there was a "due process" failure by the Supreme Court of Alabama to adhere to its own rule of procedure as prescribed by Rule 39(c) of the Alabama Rules of Appellate Procedure, and grant an automatic writ of certiorari to the petitioner as prescribed by said rule in all criminal cases involving the death penalty as a matter of right. Petitioner duly petitioned the Alabama Supreme Court for writ of certiorari on March 11, 1980, within the required fourteen days after the adverse decision of the Alabama Court of Criminal Appeals on her application for rehearing in conformity to Rule 39(b) of the Alabama Rules of Appellate Procedure. The Alabama Supreme Court denied petitioner's petition for certiorari, without opinion, in violation of said Rule 39(c) of the Alabama Rules of Appellate Procedure entitled Review of the Decisions of Courts of Appeals. See Appendix F, p. 38, infra. See Appendix I, pp. 95-99, infra.

REASONS FOR GRANTING OF THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE HOLDING ENUNCIATED BY THIS COURT'S BECK RULING.

In Beck v. Alabama, supra, this Court held that a person cannot be convicted of the offense of Capital-Murder if the jury is not afforded the opportunity to consider a verdict of guilt of a lesser included offense. Petitioner was convicted under the Alabama Death Penalty Act, §13-11-2 through §13-11-9, Code of Alabama, 1975, on a charge of intentional killing while in the commission of a robbery, by the Circuit Court of Covington County, Alabama. It was error for the Trial Court to refuse petitioner's written charges requesting the jury to consider lesser included offenses in their deliberation of the case. It

was error that Alabama's Death Penalty Statute did not provide for the jury to be afforded the right to consider the guilt of petitioner under lesser included offenses other than the verdict of guilt of the capital offense of robbery-intentional killing. In light of the Beck decision it is mandatory that this case be reversed.

2. THE INSTANT CASE DIRECTLY CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS PRINCIPLES ENUNCIATED IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §7 OF THE CONSTITUTION OF ALABAMA, 1901.

There was abject failure by the Alabama Courts to afford petitioner the rights granted a juvenile under the laws of the State of Alabama as prescribed by the Juvenile Act in §12-15-1 through 12-15-120, incl., Code of Alabama, 1975, and this failure was a denial of petitioner's right to due process of law. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); Parker v. State, Ala. Cr. App., 351 So. 2d 927, cert. denied, Ala. 351 So. 2d 938 (1977); In Re Gualt, 87 S. Ct. 1428, 35 U.S.L.W. 4399 (1967); Watts v. State, 361 So. 2d 1200.

3. "FUTURISTIC" WARNINGS BY LAW ENFORCEMENT OFFICIALS TO PETITIONER IN CUSTODY AND WITHOUT COUNSEL WERE NOT FULL COMPLIANCE WITH THE REQUIREMENTS LAID DOWN BY MIRANDA V. ARIZONA.

Compounding the grievous error of the Trial Court's violating petitioner's right under the Juvenile Act was the Trial Court's additional violation of her rights to due process restricting her from offering facts of the surrounding circumstances of her custody confinement leading up to the date the alleged "statement" was elicited from her on January 23, 1978. The Trial Court's ruling improperly restricted petitioner's inquiry into the "voluntariness" of the same. Moreover, this "statement" was obtained from an individual of low intellect subjected to repeated interrogations over a protracted period of time without counsel. The "totality of circumstances" is inescapable that petitioner's "statement" of January 23, 1978, was not voluntarily, intelligently, and under-

standingly given. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Gallegos v. Colorado, 370 U. S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962).

4. PETITIONER'S RIGHT TO A SPEEDY TRIAL GUARANTEED TO HER UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY HER INCARCERATION OF 107 DAYS PRIOR TO INDICTMENT FOR CAPITAL-MURDER ON FEBRUARY 17, 1978.

Petitioner was not charged or arrested by warrant on the charge of Capital-Murder until February 17, 1978, although she was continuously confined in custody without counsel as an indigent minor prisoner in the Covington County Jail from November 2, 1977. Petitioner was afforded none of the statutory rights of a juvenile as provided by the Juvenile Act. Petitioner was finally appointed counsel on February 17, 1978, and brought to trial on April 20-21, 1978. Not only was she held illegally in custody without warrant or charge and subjected to repeated interrogations and deprived of her rights as a juvenile, but she was clearly deprived of her right to a speedy trial guaranteed to her under the Bill of Rights of the United States Constitution.

5. THE ALABAMA SUPREME COURT FURTHER DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN ITS FAILURE TO GRANT PETITIONER A WRIT OF CERTIORARI AS REQUIRED BY RULE 39(c) OF THE ALABAMA RULES OF APPELLATE PROCEDURE IN ALL CRIMINAL CASES WHEN THE DEATH PENALTY WAS IMPOSED.

The Supreme Court of Alabama promulgated the Alabama Rules of Appellate Procedure governing all proceedings on petitions for writs or other relief and is constitutionally bound to observe the rights of all citizens respecting these rules. This obvious violation in the instant case of arbitrarily refusing to grant petitioner's application for writ of certiorari contravening the very rules which it established is further indication of the Supreme Court of Alabama's denying the petitioner due process of law.

CONCLUSION

For the reasons set out in this petition, a writ of certiorari should issue to review the judgments and opinions of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals.

Submitted by,

J. FLETCHER JONES
ATTORNEY FOR PETITIONER
P. O. DRAWER 1128
ANDALUSIA, ALABAMA 36420

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1980, I served a copy of the foregoing Petition for Writ of Certiorari upon Charles Graddick, Attorney General of the State of Alabama, by depositing a copy of the same in the United States Mail, properly addressed and postage prepaid.

J. FLETCHER JONES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-5275

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DEBRA JEANENE BRACEWELL,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-5275

DEBRA JEANENE BRACEWELL,

Petitioner

V.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Alabama, respectfully requests that this Court grant the Petition for Writ of Certiorari insofar as it raises the issue concerning the preclusion of lesser included offenses, which was involved in Beck v. Alabama, 437 U.S.____, 48 U.S.L.W. 4801 (June 20, 1980), vacate the judgement below, and remand the case to the Alabama Supreme Court for further consideration in light of the Beck decision. In the alternative, respondent respectfully requests that the petition be denied insofar as it raises issues not related to Beck v. Alabama, supra, and that the remainder of the petition be granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

QUESTIONS PRESENTED

1. Should the judgement of a state appellate court be vacated and the case remanded for further consideration in light of an intervening decision of this Court when the intervening decision raises state law questions which may avoid the federal

issues entirely, and when the federal issues should not be summarily decided?

2. Is the present case, in which there was no evidentiary basis at trial for non-capital lesser included offense instructions, distinguishable from Beck v. Alabama, 437 U.S. _____, 48 U.S.L.W. 4801 (June 20, 1980)?

3. Should a petitioner for certiorari be denied as to federal issues which were not presented to or addressed by the state appellate courts below?

STATEMENT OF THE CASE

This case arose from the Circuit Court of Covington County, Alabama after the petitioner was convicted therein on a charge of robbery where the victim was intentionally killed, Code of Alabama, 1975 §13-11-2(a)(2). (Photocopies of certain relevant statutes, opinions and rules are attached to the brief of the petitioner.) The petitioner was sentenced to death by electrocution.

The appeal of this conviction and sentence resulted in an opinion by the Alabama Court of Criminal Appeals which reversed and remanded the cause for a new trial. After application for rehearing by the State of Alabama the State filed a Petition for Writ of Certiorari in the Alabama Supreme Court. This petition ultimately resulted in an opinion of that Court of May 25, 1979 which reversed the decision of the Court of Criminal Appeals with instructions to review the entire record. After considering the same the Court of Criminal Appeals of Alabama issued its second opinion on January 22, 1979 in this cause and affirmed the petitioner's conviction but remanded the case back to the Circuit Court for a new sentence hearing. (As of this time no record of said sentence hearing has been docketed in the Court of Criminal Appeals. Thus no new sentence hearing and therefor no new sentence of death has been held or ordered by the trial court.)

The petitioner filed a petition for Writ of Certiorari in the Alabama Supreme Court asking that Court to review the incomplete

decision of the Court of Criminal Appeals of January 22, 1979. That petition was denied on April 11, 1980 by the Alabama Supreme Court.

The petitioner has now filed her present Petition for Writ of Certiorari in this Honorable Court. The respondent, State of Alabama offers this brief in opposition thereto.

HOW THE FEDERAL CONSTITUTION ISSUE WAS TREATED BELOW

There is a very substantial question as to whether or not the petitioner's first issue concerning the preclusion of lesser included non-capital offenses has been raised in the Alabama Courts below. A review of the trial record and the petitioner's initial brief in the Alabama Court of Criminal Appeals reveals that this matter is touched on in regard to the trial court's refusal of defendant's requested charge number 25. However, this matter as discussed therein was only noted to the effect that the charge should not have been refused. There is no argument whatsoever on the refusal of that charge merely the raising of that issue. Certainly there is no argument to the effect that: (a) it was error to not permit the jury to consider a verdict of a lesser included offense, nor (b) that evidence would support such consideration.

Likewise, in none of the numerous briefs, petitions and argument was this matter ever raised by the petitioner, the Alabama Court of Criminal Appeals or the Alabama Supreme Court. It is raised for the first time in this petition.

REASONS WHY THE WRIT SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF BECK V. ALABAMA

1. The Intervening Decision in Beck v. Alabama, 437 U.S. ____, 48 U.S.L.W. 4801 (June 20, 1980), Makes it Proper to Vacate and Remand for Further Consideration.

The Alabama Supreme Court's decision in denying the petitioner's premature Petition for Writ of Certiorari was issued on April 11, 1980, which was six-and-a-half months before this Court's decision in Beck v. Alabama, 437 U.S.____, 48 U.S.L.W. 4801 (June 20, 1980). This Court has long recognized that the proper practice in such cases is to vacate the state appellate court judgment and remand for further consideration in light of the intervening decision of this Court. E.g., Harlin v. Missouri, 439 U.S. 459 (1979); Heller v. New York, 413 U.S. 483, 494 (1973); Berger v. California, 393 U.S. 314 (1969).

At the time the Beck case was decided, there were nine other Alabama capital punishment cases pending before this Court on petitions for writs of certiorari to the Alabama Supreme Court. The respondent, State of Alabama, sent a letter dated June 23, 1980, requesting that this Court not reverse the judgments in those nine other cases but instead remand them to the Alabama Supreme Court for further consideration in light of the Beck decision. On June 30, 1980, this Court entered orders vacating and remanding instead of reversing those nine cases. They are: Williamson v. Alabama, No. 79-5026; Wilson v. Alabama, No. 79-5301; Horsley v. Alabama, No. 79-5458; Cade v. Alabama, No. 79-5525; Baldwin v. Alabama, No. 79-5563; Thomas v. Alabama, No. 79-5709; Ritter v. Alabama, No. 79-5741; Mack v. Alabama, No. 79-5835; and Crawford v. Alabama, No. 79-6190. This Court should take the same action in the present case.

2. Reconsideration by the Alabama Supreme Court is Particularly Appropriate, because State Law Issues Raised in the Wake of the Beck Decision May be Determinative.

This Court's decision in Beck v. Alabama, supra, holding the preclusion clause of Alabama's capital punishment statute unconstitutional as it applied in that case raises a serious and difficult question of whether that clause is severable from the remainder of the statute. Severability is a state law question which should be decided by the Alabama Supreme Court. E.g., Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

If the Alabama Supreme Court decides as a matter of state law that the preclusion clause is not severable and that the entire statute is due to be invalidated, then petitioner's conviction and sentence will be invalid as a matter of state law and there will be no necessity for further inquiry into any federal constitutional issues. Accordingly, there is no present necessity for this Court to address the federal constitutional issue of whether this case is distinguishable from Beck, because that issue may

be rendered moot by the Alabama Supreme Court's decision on severability. Cf., Bellotti v. Baird, 428 U.S. 132, 147 (1976) (abstention is appropriate where answers to state law questions "might avoid in whole or part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem").

Another state law question which should be answered before the federal constitutional issues are addressed concerns what, if any, lesser included offenses are definitionally possible as a matter of state law when a defendant like petitioner is charged with the Code of Alabama 1975, §13-11-2(a)(2) capital offense of robbery during which the defendant was intentionally killed. While the petitioner in Beck was also convicted of violating §13-11-2(a)(2), he was not charged with and convicted of robbery-intentional killing, but instead he was charged with and convicted of robbery-murder. The difference is that the indictment in Beck gratuitously averred that the intentional killing was done "with malice aforethought," an averment of first degree murder. See, Respondent's Brief on the Merits, Beck v. Alabama, O.T. 1979, No. 78-6621, page 3 n.2. The Alabama Supreme Court has held that while such an additional averment is not required, if the State makes the additional averment that the victim was murdered in the first degree instead of simply intentionally killed, then the State must prove murder in the first degree. E.g., Clements v. State, 370 So. 2d 723, 725 (Ala. 1979); Jacobs (John L.) v. State, 371 So. 2d 448, 449 (Ala. 1979).

Since the State in Beck gratuitously averred murder in the first degree instead of intentional killing, it was clear as a matter of state law that murder was a lesser included offense as was robbery, and the State conceded that point. Beck v. Alabama, 48 U.S.L.W. at 4802 & n. 5. But in the present case it is at best unclear whether any lesser included offenses

could exist. Here, the petitioner was tried under a multi-count indictment. Of the seven counts therein four make no allegation of malice but merely allege that the victim was intentionally killed. (Two others allege "malice" and one of the seven allege "malice aforethought.") The respondent's position is further supported by the general verdict returned by the jury (R.398). Certainly, "intentional killing" is not a lesser included offense, because no such crime is defined and punished anywhere in Alabama's statutes. "Intentional killing" exists only as a component part of element of robbery-intentional killing, a capital offense. The Alabama Supreme Court has not yet decided what lesser included offenses exist in a robbery-intentional killing capital case, because that issue never arose prior to Beck.

In the words of Bellotti v. Baird, 428 U.S. 132, 148 (1976), until the Alabama Supreme Court decides the state law issues raised in the wake of the Beck decision, "it is impossible to define precisely the constitutional question presented" in this case. The Alabama Supreme Court can decide the state law issues and thereby define precisely the federal constitutional questions presented, or perhaps even avoid altogether the necessity for federal constitutional adjudication, if this case is remanded for further consideration in light of Beck. Such a remand is especially desirable since the merits of the federal constitutional issue which may be presented by this case should not be summarily decided.

3. The Merits of the Federal Constitutional Issues Presented by this Case Should Not Be Summarily Decided.

The present case is materilaly different from the Beck case and that difference alters the federal constitutional issues sufficiently enough to require full briefing and argument before any decision on the merits. The crucial difference between this case and the Beck case is that in the present case there was no basis in the evidence at trial for any

lesser included offense instruction. The grant of certiorari in Beck was limited to the following question:

> May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?
> 48 U.S.L.W. 4801 (Emphasis added).

Because there was a conflict in the evidence about Beck's intent to kill, which is a necessary element of the capital offense but not of the lesser included non-capital offenses of robbery and felony murder, which were encompassed by the indictment in that case, the State conceded in Beck that there was a factual basis for a lesser offense verdict under state law. 48 U.S.L.W. 4802 & n. 5. The State conceded that the jury in that case would have been instructed on two lesser included offenses had it not been for the preclusion clause. Id. The present case is different.

In the present case, as a matter of state law the petitioner was either guilty of the Code of Alabama 1975, §13-11-2(a)(2) capital offense of robbery during which she intentionally killed the victim, or she was guilty of nothing at all. There was no evidence placing into dispute the petitioner's intent to kill, and petitioner's confession admitting the intentional killing was admitted into evidence.

That factual distinction between the present case and Beck mandates a different holding in the two cases. Not only did this Court expressly limit its holding in Beck to cases in which there was an evidentiary basis at trial for lesser included offenses, Beck v. Alabama, supra, 48 U.S.L.W. 4801 ("We now hold that the death penalty may not be imposed under these circumstances."), but all of the precedents relied upon in that decision are similarly limited. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973) ("if the evidence would permit a jury to rationally find him guilty of the lesser offense

and acquit him of the greater"), quoted on 48 U.S.L.W. at 4803; Berra v. United States, 351 U.S. 131, 134 (1956) ("if the evidence justified it"), quoted on 48 U.S.L.W. at 4804 n. 11; Stevenson v. United States, 162 U.S. 313, 323 (1896) ("if there be any evidence fairly tending to bear upon the issue"), quoted on 48 U.S.L.W. at 4803-4804 n. 11; Jackson v. State, 337 So. 2d 1242 (Miss. 1976) (not "indiscriminately or automatically," but only when "warranted by the evidence"), summarized on 48 U.S.L.W. at 4803 n. 10.

Any extension of Beck to mandate lesser included offense instructions even when there was no evidentiary basis for them at trial would not only conflict with all those precedents but would also be contrary to the holding in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, this Court upheld Georgia's capital punishment statute which provides that lesser included offense instructions shall be given only when there is evidence to support them. 428 U.S. at 160, 161 n. 2 (joint opinion); id., at 215-216 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.) This long line of precedents should not be overturned without full briefing and argument, and this is especially true in light of the confusion caused by a summary ruling on the merits in a past capital case. See, Roberts (Harry) v. Louisiana, 431 U.S. 633, 635 (1977) (per curiam); id., at 639 (concurring opoin of Blackmun, J., joined by White and Rehnquist, J.J.). At the very least, the conviction and sentence in this case should not be summarily reversed. If the judgment is not vacated and the case remanded to the Alabama Supreme Court for further consideration in light of the Beck decision, then full briefing and argument on the merits should be ordered.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE NON-BECK ISSUES RELATED IN THE PETITION

1. These Non-Beck Issues Raised by the Petition were not Presented or Decided by the Alabama Appellate Courts.

The petitioner has raised four issues separate and apart from his one Beck related issue. Briefly, they are that the petitioner was not afforded certain rights under the juvenile Code of Alabama, the determination of a proper Miranda warning in light of the "futuristic" aspects of the warnings given, the denial of a speedy trial, and the Alabama Supreme Courts's failure to properly interpret one of its own rules. (This last issue is discussed in the following section of this brief under "Reasons Why the Entire Petition is Premature." This issue was obviously not raised prior to this petition.)

Of the three remaining non-Beck issues there is no question that the speedy trial matter has never been presented in the Alabama Appellate Courts. Neither has this due process argument concerning the "futuristic" aspects of the Miranda warning ever been raised. Judge Tyson of the Alabama Court of Criminal Appeals spoke to this matter after remandment by the Alabama Supreme Court in a dissenting opinion. However, it was never addressed in any opinion by that Court, the Alabama Supreme Court, nor in any brief filed by the petitioner either before or after the dissent by Judge Tyson. This particular argument is raised for the first time in this petition.

The question of the petitioner being afforded the full protection of any rights under the Alabama Juvenile Code is also raised for the first time in this Court. The petitioner made strong arguments in the Alabama Courts concerning the Juvenile Code's definition of a "child" as it related to her confession. However, no arguments concerning this "abject failure" to afford the petitioner her rights under the juvenile code have ever been raised before. The petitioner can not now expand a very limited, narrow issue concerning a particular code definition into a broad general argument of her rights merely because she has filed this petition.

The answer to all of these arguments is that petitioner did not raise them either at trial or in the Alabama Appellate

Courts. When a state appellate court fails to pass on a particular federal question, this Court should presume that it was due to the want of proper presentation, unless the aggrieved party can show to the contrary. Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 582 (1969).

Because petitioner did not present these issues below, this Court need not decide them, Beck v. Alabama, supra, 48 U.S.L.W. at 4803 n. 8 (majority opinion), Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide them, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide them. Beck v. Alabama, supra, 48 U.S.L.W. at 4807 (dissenting opinion of Rehnquist, J., joined by White, J.); Street v. New York, 394 U.S. 567, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257(2) and (3).

REASONS WHY THE ENTIRE PETITION IS PREMATURE

In speaking to the last issue raised by the petitioner (as Issue 5 in the Petition) the respondent finds itself with the opportunity to argue that this entire petition is premature and therefore due to be denied.

Petitioner's Issue 5 asserts that the Alabama Supreme Court denied her due process when it failed to grant her petition filed therein. As noted above, the petition was in all probability denied (without opinion) because the sentencing process had not been completed. It must be remembered that on remand the Court of Criminal Appeals remanded (after affirming) the case back to the trial court in order for a new sentence hearing to be held. Therefore it can be said that the sentencing procedure was not complete and the petitioner's Petition for Certiorari in the Alabama Supreme Court was premature and therefore properly denied. The Code of Alabama 1975, §13-11-5, relied on by petitioner requires automatic review only after "conviction and sentence of death." (emphasis added) No such sentence has been entered.

Therefore, the respondent would further contend that since the Alabama Appellate process has not been completed then this present petition is premature and subject to being denied.

CONCLUSION

For these reasons, the petition insofar as it raises issues related to Beck v. Alabama, 437 U.S._____, 48 U.S.L.W. 4801 (June 20, 1980), should be granted, the judgment below vacated, and the case remanded to the Alabama Supreme Court for furhter consideration in light of the Beck decision. Alternatively, the petition should be denied insofar as it raises issues not related to Beck, and the remainder of the petition granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

Respectfully submitted,

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